No. 06-484

IN THE
SUPREME COURT OF THE UNITED STATES

TELLABS, INC. AND RICHARD C. NOTEBART,
Petitioners,

v.

MAKOR ISSUES & RIGHTS, LTD., ET AL.,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE CENTER FOR STUDY OF RESPONSIVE LAW AND PUBLIC CITIZEN AS *AMICI CURIAE* SUPPORTING RESPONDENTS

JONATHAN W. CUNEO
WILLIAM H. ANDERSON
R. BRENT WALTON
MATTHEW WIENER*
CUNEO GILBERT & LADUCA, LLP
507 C Street, NE
Washington, DC 20002
(202) 587-5068

ALAN HIRSCH
Legal Studies Program
Mather House, Room 204
Williams College
Williamstown, MA 01267
(413) 458-2192

Counsel for Amici

*Counsel of Record

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INTEREST OF AMICI CURIAE*

The Center for Study of Responsive Law is a nonprofit, nonpartisan research and education organization. It was founded by Ralph Nader in 1968. Since then it has sponsored a wide variety of books, organizing projects, and litigation and has hosted hundreds of conferences focusing on corporate and government accountability. One of the Center's primary goals is to empower citizens. Public Citizen is a national, non-profit consumer advocacy organization that represents consumer interests before Congress, the executive branch, and the courts. One of its principal missions is ensuring the right of individual consumers to seek redress for their injuries in the courts. To that end, it has appeared before this Court numerous times as a party and as an *amicus curaie*.

SUMMARY OF ARGUMENT

Amici's principal contention is this: The heightened-pleading provision of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4(b)(2), does not require the plaintiff to plead facts establishing an inference any stronger than a jury would require to return a verdict for the plaintiff under the preponderance-of-the-evidence standard of proof. Facts that, if true, would allow a jury to conclude that the plaintiff's allegation of scienter is more likely true than not establish a "strong inference," and they do so even in the presence of so-called "competing inferences." Neither the PSLRA nor the Seventh Amendment allows a

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* No party's counsel wrote this brief (in whole or in part), and no person other than *amici* and their counsel contributed monetarily to this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

district court to demand that the plaintiff plead an inference any stronger than required to satisfy the burden of proof.

ARGUMENT

A. The Court Should Decline Petitioners' Invitation to Write Additional Gatekeeper Provisions Into the Carefully Constructed and Comprehensive Enforcement Provisions of the PSLRA.

1. The PSLRA was "the most ambitious overhaul of the private securities laws ever undertaken." Richard H. Walker & J. Gordon Seymour, *Recent Judicial and Legislative Developments Affecting Private Securities Fraud Class Actions*, 40 Ariz. L. Rev. 1003, 1023 (1998). This "comprehensive federal charter" was the product of years of Congressional investigation, consideration, and compromise. Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 Rev. Litig. 557, 592 (2003).

Most of the PSLRA's reforms were targeted at the perceived abuse of securities class action litigation by the plaintiffs bar, not private securities fraud litigation as such. *See Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Dabit*, 126 S. Ct. 1503, 1510 (2006). Congress did not seek to impede the access of defrauded investors to the federal courts or to immunize those who violate the law from liability for the financial loses they cause. To the contrary, Congress recognized that private litigation is "an essential supplement to criminal prosecution" and government enforcement actions, Brief of United States ("SG Br.") at 1, necessary both to ensure the integrity of the "capital markets" and to provide "defrauded investors" "an indispensable tool" to recover their financial losses. H.R. Conf. Rep. No. 104-369, at 1, *reprinted in* 1995 U.S.C.C.A.N. 730. *See Merrill Lynch*, 126 S. Ct. at 1510.

Over a decade after enactment of the PSLRA, Congress' commitment to private securities fraud litigation as an important vehicle to enforce the federal securities laws remains strong. This is reflected, among other things, in Congress' recent lengthening of the statute of limitations in private securities fraud cases. *See* 28 U.S.C. § 165.8(b).

2. The PSLRA made dozens of detailed changes to both the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77, and the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78. The specific problem to which Congress directed the PSLRA's heightened pleading requirements was "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to the underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plaintiff cause of action." H.R. Conf. Rep. No. 104-569 (statement of managers), *reprinted in* 1995 U.S.C.C.A.N. 730.

Yet the PSLRA's special pleading provision is but one of many provisions of the PSLRA's detailed and comprehensive enforcement scheme designed to protect securities issuers from these so-called "fraud by hindsight" suits. There are many others—most of them entirely ignored by Petitioners and the *amici* supporting them—including the statutory provisions that increase client control over the litigation by requiring (among other things) the plaintiff to certify that he or she has reviewed the complaint and authorized its filing, *see* 15 U.S.C. §§ 77z-1(a)(2)(A)(i), 78u-4(a)(2)(A(i); accord presumptive control of class litigation to a responsible lead plaintiff (which usually turns out to be an institutional investor) empowered to hire and fire lead counsel, *see id.* §§ 77z-1(a)(3)(B), 78u-4(a)(3)(b); impose a mandatory discovery stay unless and until the complaint survives a motion to dismiss, *see id.* §§ 77z-1(b)(1), 78u-4(b)(3)(B); augment

pleading requirements concerning the identity of the statements alleged to be fraudulent, *see id.* § 78u-4(b)(1); create a mandatory court review of parties' and attorneys' conduct under the sanction provisions of Fed. R. Civ. P. 11(b), and provide for a presumptive award of attorneys' fees as a sanction for Rule 11 violations, *see id.* §§ 77z-1(c), 78u-4; confer on the defendant a right to submit particularized written interrogatories to the jury on the issue of scienter, *see id.* §§ 77z-1(d), 78u-4(d); and immunize certain forward-looking statements from civil liability through a "safe harbor provision" (which itself contains special pleading requirements), *see id.* § 78.

Contrary to Petitioners' suggestion, the Court should not interpret the "strong inference" pleading requirement as if it were the PSLRA's exclusive protection against non-meritorious lawsuits. Rather, it should view that pleading requirement for what it is: but one of many links in a comprehensive network of detailed, interrelated, and mutually reinforcing defendant-protective provisions.

3. Although Petitioners and their *amici* ostensibly ask the Court only to interpret the PSLRA's "strong inference" pleading requirement, they are really asking the Court to authorize unprecedented incursions into well-established principles governing the disposition of motions to dismiss. Especially troubling is Petitioners' and the Solicitor General's contention that the Court should authorize district courts to (1) dismiss even complaints whose factual allegations, if true, would allow a jury to find scienter, *see infra* § B, (2) weigh and choose among competing inferences, *see infra* § C, and (3) displace the role of juries as fact-finders, *see infra* § D.

Petitioners ask the Court to impose procedural hurdles in securities litigation that Congress did not include in the PSLRA. Nowhere is this more evident than in Petitioners' request that the Court import into motion-to-dismiss practice

the summary judgment principles applied in two particular types of antitrust cases: predatory pricing conspiracy cases, *see Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986), and vertical price fixing cases, *see Monsanto v. Spray-Rite Serv. Co.*, 465 U.S. 752 (1984). *See* Brief of Petitioner ("Pet. Br.") at 30-31. These are summary judgment cases decided under a statute that, unlike the PSLRA, delegates important policy-making functions to the courts. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Petitioners offer no evidence that Congress intended to give courts similar policy-making authority under the PSLRA. That Petitioners are even relying on these cases shows just how far they have crossed the line between interpreting the PSLRA and prescribing a new set of procedural requirements to achieve their policy objectives.

4. Petitioners contend that, unless the Court imposes additional procedural hurdles on plaintiffs, too many non-meritorious suits will survive motions to dismiss. *See* Pet. Br. at 16; *see also* Brief of Chamber of Commerce et al. *passim*. All of the specific concerns that Petitioners identify, however, are already dealt with adequately in the PSLRA.

Petitioners contend, in particular, that the Court must address the problem of "strategic pleading"—the deliberate omission of facts that, had they appeared in the complaint, would have detracted from a cogent inference of scienter. *See* Pet. Br. at 17-18. But the PSLRA already addresses this claimed problem by requiring that, for each statement alleged to be "misleading," the complaint plead scienter "with particularity." U.S.C. § 78u-4(b)(2). Other provisions of the PSLRA likewise discourage strategic pleading, including the requirement that a lead plaintiff—which is usually an institutional investor—sign the complaint. *See id.* § 78u-4(a)(2)(A)(i). Few institutional investors will put their reputations on the line by signing misleading complaints.

B. The Plaintiff Need Not Plead Facts That, If True, Would Establish a Stronger Inference Than Required to Allow a Jury to Find Scienter Under the Governing Preponderance-of-the-Evidence Standard.

1. However the Court chooses to characterize the strength of the inference required by the PSLRA's pleading requirement, it should lay down one important constraint on trial courts deciding motions to dismiss under Fed. R. Civ. P. 12(b)(6): They may not, contrary to Petitioners', the Solicitor General's, and other *amici*'s overriding contention, demand a stronger inference of scienter than the underlying burden of proof applicable in securities fraud cases allows.

2. Although the PSLRA imposes heightened pleading requirements, it does not impose a heightened burden of proof at trial (or at summary judgment)—with respect to scienter or any other element of a private securities fraud cause of action. *See, e.g.*, *Phillips v. LCI Int'l*, 190 F.3d 609, 620 (4th Cir. 1999) ("The PSLRA did not change the standard of proof a plaintiff must meet or the kind of evidence a plaintiff must adduce to demonstrate scienter at trial in a securities fraud case."); *accord Florida. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 653-54 (8th Cir. 2001); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 408 (5th Cir. 2001); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000); *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 200 (1st Cir. 1999); *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 549-50 (6th Cir. 1999); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999). The standard of proof remains preponderance of the evidence. *See, e.g.*, *SEC v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004). *See generally Herman & McClean v. Huddleston*, 459 U.S. 375, 390 (1983) (holding that preponderance-of-the-evidence standard applies to private securities fraud claims). To obtain a jury verdict and withstand a defense motion for judgment as a matter of law, then, the plaintiff need not introduce any more evidence than

a reasonable juror would need to conclude that the allegation of scienter is more likely true than not true. *See Herman*, 459 U.S. at 390 (holding that plaintiffs must prove "*that it is more likely than not* that they were defrauded") (emphasis added).

The Court should interpret the PSLRA's strong-inference pleading standard consistent with the plaintiff's burden of proof at trial. It should not require the plaintiff to plead facts that, if true, would establish an inference any stronger than necessary to allow a reasonable jury to return a verdict for the plaintiff under the preponderance-of-the-evidence standard—that is, for the jury to conclude that the plaintiff's allegation of scienter is more likely true than not. Requiring the plaintiff to plead an inference any stronger than the preponderance-of-the-evidence standard demands will result in the dismissal of complaints containing factual allegations strong enough (if proved) to support a jury verdict for the plaintiff. Congress could not have intended that anomalous—and, as we argue below, likely unconstitutional—result. *See infra* § D.

3. We are not urging the Court to adopt a standard that dilutes the "strong inference" requirement. An inference strong enough to allow the plaintiff to withstand a motion for judgment as a matter of law and sustain a jury verdict in the plaintiff's favor *is*, by any measure, a strong inference. Many legal inferences are not nearly so strong. One familiar sort of inference, for example, gives rise only to a prima facie case that serves to shift the burden of production (not persuasion) to the defendant; once met with contrary evidence, this inference loses its force. *See, e.g.*, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510-11 (2002) (discussing inference that gives rise to a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and progeny). We are only urging the Court to reject an interpretation of the PSLRA that puts its "strong inference" pleading standard at odds with the standard of proof.

4. The Solicitor General sees no need for any such constraint on the interpretation of the phrase "strong inference." He readily admits that the "practical effect" of the super-heightened pleading requirement he urges the Court to adopt would be to screen out complaints at the motion-to-dismiss stage whose factual allegations, if later proved, would suffice to allow a reasonable jury to find scienter under a preponderance-of-the-evidence standard. *See* SG Br. at 29-30 n.9. The Solicitor General suggests that this is the price of all heightened pleading requirements. *See id.* at 28-29. Not so. Heightened pleading and heightened proof requirements differ in important respects. *See, e.g., Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 470 (7th Cir. 1999) (Posner, J.). Heightened pleading requirements demand that the plaintiff lay out, with greater specificity than Fed. R. Civ. P. 8's notice pleading requirements demand, the facts the plaintiff must later prove at trial to establish liability. But heightened pleading requirements generally do not dictate the required strength of the plaintiff's factual showing. That is a function of the underlying burden of proof.

C. The Court Should Interpret the "Strong Inference" Pleading Requirement to Give Effect to, Rather than Undercut, the Well-Established Division Between Judge and Jury Respecting Competing Inferences.

1. Of all the arguments made by Petitioners, none is as objectionable as their argument that the PSLRA authorizes district courts to weigh competing inferences at the motion-to-dismiss stage. Nothing in the PSLRA changes the time-honored principle that, in ruling on a pre-trial dispositive motion, a court must draw all reasonable inferences in favor of the non-moving party. The PSLRA's requirement that plaintiffs plead facts giving rise to a "strong inference" of the defendant's culpable mental state raises the initial bar plaintiffs must hurdle, but it in no way alters the fundamental principle of adjudication that "[t]he evidence of the

nonmovant is to be believed and *all justifiable inferences are to be drawn in his favor*." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) (emphasis added); *see City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 683 (6th Cir. 2005) (so holding under the PSLRA).

Anderson is instructive because it involved a pretrial motion to dispose of a claim as to which the plaintiff confronted a heightened burden. To prevail on the merits of its defamation claim in *Anderson*, the plaintiff needed to offer "clear and convincing proof." 477 U.S. at 244. The Court clarified that insofar as the clear and convincing standard would govern the determinations at trial on the merits, it also applied on summary judgment. The Court then explained that the higher proof standard provided no license for a trial court to draw inferences and weigh evidence: "the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 249. Noted commentators have emphasized that *Anderson* precludes judges from "select[ing] from among disputed inferences." William W Schwarzer, Alan Hirsch, & David Barrans, *The Analysis and Decision of Summary Judgment Motions* 60 (Federal Judicial Conference 1991) (emphasis added) (hereafter "Schwarzer").

Anderson undercuts Petitioners' argument that the trial court should consider "innocent inferences" respecting scienter. A jury is free to consider such inferences. But the trial court is not. It must credit all of plaintiff's reasonable inferences. To do otherwise flies in the face of *Anderson*'s command that the facts be considered in the light most favorable to the plaintiff.

2. The controlling principle here is not some technical procedural rule; it lies at the heart of the judge-jury distinction and the right to a jury trial. "If there are any non-frivolous grounds for choosing between competing inferences, the jury should be permitted to choose. A court's judgment that two

inferences are equally strong is no substitute for a jury's." Schwarzer at 66. Under Petitioners' approach, a trial court would be licensed to make its own assessments of which inferences should be drawn, thereby usurping the fact-finder's role to choose between conflicting inferences. *See, e.g., Tennant v. Peoria & Pacific Union Ry.*, 321 U.S. 29, 35 (1944) ("It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences); *accord Schulz v Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956).

3. *Anderson* involved summary judgment, but it has long been recognized that Fed. R. Civ. P. 12(b)(6), no less than Fed. R. Civ. P. 56 or Fed. R. Civ. P 50, requires that evidence be weighed and inferences drawn favorably to nonmovants even in cases involving heightened pleading requirements. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co*, 492 U.S. 229, 249 (1989) (RICO); *SEC v. Zandford*, 535 U.S. 813, 818 (2002) (securities); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 618 (2003) (fraud). If anything, the court's role in deciding a motion to dismiss is more circumscribed than its role in deciding a summary judgment stage precisely because Fed. R. Civ. P. 12(b)(6) limits the court to the plaintiff's own allegations and requires the court to construe the allegations in the light most favorable to the plaintiff. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

4. This does not mean that plaintiffs cannot plead themselves out of court. As the Solicitor General notes, plaintiffs can include allegations that preclude a finding of scienter. *See* SG Br. at 25. What district courts may not do, however, is weigh the competing inferences that a jury could reasonably draw from the plaintiff's complaint allegations.

D. The Interpretation Urged by Petitioners, the Solicitor General, and Other *Amici* Puts the PSLRA on a Collision Course with the Seventh Amendment.

1. The Court has emphasized that the Seventh Amendment right to trial by jury is "fundamental" and should be "jealously" guarded and may not be abridged by Congress or the courts. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-48 (1830); *see also Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 387 (1913). Even a "*seeming* curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (emphasis added).

The construction of the PSLRA urged by Petitioners, if it does not render the PSLRA unconstitutional under the Seventh Amendment, at the very least raises serious questions as to the statute's constitutionality. Under the constitutional avoidance doctrine, the Court should choose an interpretation of the PSLRA that avoids a serious constitutional question where another—at least "permissible"—interpretation is before the Court. *Curtis* v. *Loether*, 415 U.S. 189, 192 n.6 (1974); *see also Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 358-59 (1998) (J. Scalia, concurring) (emphasizing that the doctrine "does not require that the "problem avoiding construction" be the preferable one, just that it be a "reasonable one").

2. Petitioners and the Solicitor General urge the Court to interpret the heightened pleading requirement so as to authorize a district court to dismiss a complaint whose factual allegations, if true, would allow a jury to return a verdict for the plaintiff under the preponderance-of-the-evidence standard—and to do so by engaging in an inference-weighing exercise of the sort that *Anderson* forbids at the summary judgment stage even under a heightened standard of proof. Congress could not have intended, however, so serious an affront to the Seventh Amendment's right to a jury trial.

Congress can amend the securities laws to elevate the burden of proof at trial or require plaintiffs to plead particular facts or allegations with specificity. *See Dura Pharmaceuticals, Inc., v. Broudo*, 544 U.S. 336, 346 (2005). But we are aware of no cases holding that once Congress has established the burden of proof to determine the sufficiency of the evidence at trial, it may then condition the right to a jury trial on the pleading of factual allegations stronger than required to satisfy that burden. A case built around factual allegations that, if true, would permit a jury to return a verdict for the plaintiff cannot be screened out at the motion-to-dismiss stage or (assuming that the plaintiff backs his allegations with evidence satisfying Fed. R. Civ. P. 56) at the summary judgment stage either. It must go to the jury. *See Best v. District of Columbia*, 291 U.S. 411, 414 (1934).

It is no answer that Congress has created a number of procedural devices that "have diminished the civil jury's historic domain [but] have been found not to be inconsistent with the Seventh Amendment," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979), such as motions to dismiss, motions for summary judgment, and trial and post-trial motions for judgment as a matter of law. *See* Pet. Br. at 43 n.20; SG Br. at 28. The Court has repeatedly rejected efforts to use these devices to take an issue away from the jury when—construing the facts in a light most favorable to the plaintiff and drawing all reasonable inferences in the plaintiff's favor—a reasonable jury could return a verdict for the plaintiff. *See, e.g.*, *Tennant*, *supra*; *Shulz*, *supra*; *Best*, *supra*; *Swierkiewicz*, *supra*; *Conley v.* Gibson, 355 U.S. 41, 48 (1957); *see also* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 241 (noting that from 1938 to 1968 the Court granted certiorari in 25 cases where appeals courts overturned jury verdicts for insufficient evidence and reinstated the jury verdicts in 24 cases).

3. The Solicitor General and several *amici* argue that because the strong inference pleading requirement is merely a pleading requirement, it presents a "threshold legal hurdle that a plaintiff must surmount in order to state a claim (and thereby obtain discovery)." SG Br. at 28. The right to a jury trial does not "accrue," they argue, until the plaintiff surmounts this threshold hurdle. *Id.* Hence Congress may condition the right to a jury trial on the plaintiff's satisfaction of any pleading requirement that Congress chooses to impose. No case supports this contention—especially not *Fidelity & Deposit Co. v United States*, 187 U.S. 315, 320 (1902), the principal case on which the Solicitor General relies. *Fidelty* upheld against a Seventh Amendment challenge a procedural rule that required a defendant in a contract action to set forth facts that, if true, would support his affirmative defense to the plaintiff's claim of breach. The rule authorized entry of judgment for the plaintiff when the defendant failed to submit an affidavit of defense after the plaintiff had filed his own supporting affidavit, just as Fed. R. Civ. P. 56 authorizes summary judgment for the plaintiff when the defendant faces a summary judgment motion and fails to marshal evidence sufficient to create a genuine issue of material fact. *See id.* ("The summary judgment procedure . . . 'prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.' "). The rule did not demand that the defendant make a factual showing stronger than that required for the jury to return a verdict in his favor.

Fidelity does not suggest that pleading requirements never infringe upon Seventh Amendment rights. In fact *Fidelity* suggests otherwise. *Fidelity* quoted from *National Metropolitan Bank v. Hitz, I MacArth. & M. 198, 200* (S.Ct. D.C. 1879), to distinguish the rule at issue, which was not unconstitutional, from a rule that essentially required a party "try his case in his plea." *Id.* at 320 (quoting *Hitz*). In *Hitz*, the D.C. Supreme Court declared a court's entry of a verdict

for noncompliance with a rule that required one to try his case "in plea" would be improper because, in entering the verdict, the trial court would impermissibly resolves jury issues.

4. Contrary to the Solicitor General's position, application of pleading requirements may present Seventh Amendment questions. The "right . . . preserved [by the Seventh Amendment] *is the right to have the issues of fact presented by the pleadings* tried by a jury." *Slocum*, 228 U.S. at 397. A constitutional problem arises when the plaintiff pleads facts (at whatever level of specificity Congress may require) that would, if true, allow a reasonable jury to return a verdict for the plaintiff under whatever standard of proof governs the plaintiff's claim.

Assume, for example, that the PSLRA required the plaintiff to "*state with particularity sufficient facts giving rise to one and only one inference, namely, that the defendant acted with the required culpable state of mind*," but did not alter the burden of proof. Assume further that a plaintiff sufficiently alleged a "strong inference" of scienter and even attached a "smoking gun" document to the complaint that, if the jury credited, proved scienter. In this instance, the court's application of a pleading burden higher than the burden of proof at trial would result in the dismissal of the claim even though the jury could have—indeed likely would have—returned a verdict in favor of the plaintiff under the substantive law. A court's application of this heightened pleading requirement would render the right to a jury trial wholly illusory. Yet according to the Solicitor General's argument, the court's application of the heightened pleading standard under the above-referenced hypothetical would pose no Seventh Amendment problem because the plaintiff's right to a jury trial would never have "accrued."

The Solicitor General's contention proves too much. When a court dismisses a case whose factual allegations, if

true, would allow a jury to return a verdict for the plaintiff, the court has usurped the function of the jury to decide issues of fact and apply the law to the facts. The Seventh Amendment requires that juries determine whether the facts (alleged or evidenced) and the reasonable inferences drawn from them satisfy the plaintiff's burden of proof.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JONATHAN W. CUNEO
WILLIAM H. ANDERSON
R. BRENT WALTON
MATTHEW WIENER*
CUNEO GILBERT & LADUCA, LLP
507 C Street, NE
Washington, DC 20002
(202) 587-5068

ALAN HIRSCH
Mather House, Room 204
Williams College
Williamstown, MA 01267
(413) 458-2192

Counsel for Amici

*Counsel of Record

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